No. 2623

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Reply Brief of Plaintiff in Error

Upon Writ of Error from the United States District Court for the District of Alaska, Division No. 1

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Reply Brief of Plaintiff in Error

In replying to the brief of the defendant in error, it will probably be well to preserve the three divisions into which the original brief of the plaintiff in error is divided.

Specification of error No. I raises the question of the sufficiency of every count contained in each of the several indictments. Specifications of error Nos. II and IV raise this same question with the added consideration that the evidence introduced by the government did not support the verdicts, finding the defendant guilty of the commission of acts denounced by section 5 of the Act of June 26, 1906 (section 263 of the Compiled Laws of Alaska).

Section 5 of the Act of June 26, 1906, upon which the three indictments filed against the defendant, now plaintiff in error, are based, provides as follows:

"That it shall be unlawful to fish for, take or kill, any salmon of any species in any manner or by any means, except by rod, spear or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock Post Meridian of Saturday of each week until six o'clock Ante Meridian of the Monday following, or to fish for, or

catch, or kill in any manner, or by any appliances except by rod, spear or gaff, any salmon in any stream of less than 100 yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. **Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed and twenty-five feet of webbing or net of the "heart" of such traps on each side of the "pot" shall be lifted or lowered, in such a manner as to permit the free passage of salmon and other fishes."**

Counsel for the government used two set formulas throughout all of the indictments in attempting to charge the crime of illegal fishing under this statute. Counts 1 and 2 in indictment 1034-B and counts 1 and 2 in indictment 1035-B, charge that the defendant **did unlawfully and wrongfully maintain and operate for fishing certain designated fish traps without having twenty-five feet of the webbing or net of the heart of such trap on each side, next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.**

The balance of the counts in indictments 1034-B and 1035-B and all of the counts in indictment 1036-B, charge that the defendant **did unlawfully and wrongfully maintain and operate for fishing**

certain designated traps without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.

The defendant filed demurrers to each indictment and to every count contained therein. One of the assignments of demurrer to every count of each of the indictments is as follows:

"That said indictment does not state facts sufficient to constitute any crime against (on the part) of said defendant corporation." This is followed by a special demurrer to every count of each indictment, which sets up the same assignments throughout, in accordance with the Alaska practice.

Specification of error No. 1 is directed against the action of the court in overruling the said demurrers of the defendant to the indictments herein.

The defendant, now plaintiff in error, contends that every count of each indictment fails to charge any act, denounced as an offense by the statute in question, in that every count fails to charge that the defendant **did fish for, take, or kill any salmon of any species** during the weekly close season.

The plaintiff in error further contends that the acts charged by the indictment are not in themselves offenses under the statute, as the part of the

statute upon which they are based was intended by Congress merely to give effect to other parts of the act, by preventing the commission of any of the offenses denounced by it, and that in effect its provisions are merely directory.

There are no provisions in the act which make the failure to comply with the terms of the passage relative to the closing of traps during the weekly close season, equivalent to the commission of the acts therein denounced as offenses. The act does not directly or inferentially provide that the failure to conform with its directions in the closing of traps shall constitute the crime denounced by the act. In fact, the act does not even go so far as to make the failure to comply with the trap closing regulations **evidence** of the commission of the offense it denounces.

Under the rules of construction prevailing in the courts of the United States, a legislative act is to be interpreted according to the intent of the legislature apparent upon its face. The intent of the lawmaker is the law.

U. S. v. Fisher, 109 U. S. 145.
Jones v. Guarantee, etc., Co., 106 U. S. 626.

The statute in question shows plainly upon its face that it was the intention of Congress to denounce certain specific acts as offenses and it very clearly shows just what acts were included in this denunciation. Its express provisions as to what

acts are included is absolutely incompatible with the contention of counsel for the government. It shows upon its face that it was intended to denounce **the fishing for, the taking, and the killing of salmon.** Any other matter included therein was incorporated in order to assist in reaching the end desired by the framers of the statute, viz: **the prevention of salmon fishing during the weekly close season.**

The citations of the district attorney to Bishop's Criminal Procedure, as well as his quotations from Starkey and Chitty (pages 20, 21, 22 and 23, defendant in error's brief), are mere generalities and have no bearing upon the question at issue **as they take for granted that the charge of the grand jury in an indictment is based upon a statute denouncing the particular acts charged as offenses.**

In the case at bar the indictments absolutely fail to charge any of the acts denounced as offenses in the statute.

After citing Chitty, Starkey and Bishop concerning the necessity of the indictment following the statute in charging the offense, counsel for the government makes this significant statement concerning the charges embodied in the indictments in this case, page 25, brief of defendant in error:

"This is charging the offense in haec verba of the statute **except the statute says: 'It shall be unlawful to fish for, etc.,' while the indictment de-**

scribes the offense by charging 'did unlawfully maintain and operate for fishing, etc.'

Now it is clear that **to maintain and operate for fishing is simply another way of saying 'did fish by means of a fish trap.' 'To operate for fishing is to fish.'** Now if the defendant **did fish by the means of a fish trap** in the manner and under the circumstances set out in the indictment then surely the law would be violated."

What counsel means by the charging of the offense in the haec verba of the statute is very hard to determine under the circumstances.

He contends that he charged the offense denounced "in the haec verba of the statute" and then in effect says **except the part of the statute that names and defines the offense.** This statement is absolutely contradictory and not a little startling, as it is an absolute admission by counsel, while protesting that the statute was followed, that in fact the statute was not followed.

Counsel for the plaintiff in error quite agrees with the district attorney that a part of the statute is followed in effect in the charging part of the indictments and that another part of the statute is absolutely ignored therein. Counsel also takes the view, however, that the part of the statute omitted by the district attorney is the part which it is absolutely necessary to follow in order to charge the crime denounced by the statute, **as that is**

the only part of the statute that actually specifies what the crime is, and defines the manner in which it may be committed.

Counsel for the government could not have made a more complete confession of the correctness of the contention of the plaintiff in error, and the fact that the indictments do not follow the statute in charging the crime, must stand as admitted by the government.

Counsel for the government attempts to modify this admission by the statement that "it is clear that 'to maintain and operate for fishing' is simply another way of saying 'did fish by means of a fish trap.'" Unfortunately for his contention, the authorities do not bear him out on this point but on the contrary the weight of authority is against his contention. While we are not willing to admit that "did fish by means of a fish trap" is equivalent to "did fish for, take or kill by means of a fish trap," we are equally positive in our belief that the words "to maintain and operate for fishing" do not specify any of the acts denounced as offenses by section 5 of the Act of June 26, 1906.

An indictment is fatally defective if an essential element of the crime intended to be charged is omitted, and the sufficiency of the indictment is to be tested by ascertaining whether it contains every element of such offense. All matters required by the act as prerequisites to a criminal conviction must

be set out in the indictment in order to make it sufficient, and as nothing in a criminal case can be charged by implication, intendment, or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged.

U. S. v. Hess, 124 U. S. 483.

U. S. v. El Paso N. E. R. Co., 178 Fed. 845.

U. S. v. Carll, 105 U. S. 612.

U. S. v. Simmons, 96 U. S. 360.

Commonwealth v. Clifford, 8 Cush. (Mass.) 215.

Commonwealth v. Bean, 11 Cush. (Mass.) 414.

Commonwealth v. Bean, 14 Gray (Mass.) 52.

Commonwealth v. Filburn, 119 Mass. 297.

U. S. v. Louisville & N. R. R. Co., 165 Fed. 936.

U. S. v. Post, 113 Fed. 852.

U. S. v. Marx, 122 Fed. 964.

Upon applying the test laid down by the above cited cases to the indictments at bar, for the determination of their sufficiency, it will be readily seen that they do not come up to the requirements therein specified.

The indictments at bar do not contain every es-

sential element of the crime intended to be charged, as nowhere do they charge that the defendant **fished for, took or killed any salmon of any species.** The indictments do not set up all the matters required by the act as prerequisite to a criminal conviction. **They do not charge the defendant with fishing as defined and prohibited by the act.** The indictments do not directly and affirmatively allege every fact necessary to be proven in order to constitute the crime charged, **because they do not allege that the defendant committed the crime denounced by the statute.**

In order to support the contention of the district attorney (page 25, defendant in error's brief) it would be necessary to put a very strained construction upon the charges contained in the indictments, and to read matter into them that they do not contain. It is very doubtful whether the indictments charge the offense of illegal fishing even by implication, because they do not contain any allegations necessary to complete the charge, and because they wholly omit to charge the gist of the offense.

What sustaining force counsel for the government finds in the cases of U. S. v. Carll, 102 U. S. 612, U. S. v. Cook, 17 Wall. 168, and U. S. v. Simmons, 96 U. S. 360, cited in his brief (page 25) is hard to perceive, as they are all against the contention in support of which they are cited.

The indictment must charge all the elements

which constitute the crime so particularly as to enable the defendant to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense.

U. S. v. Hess, 124 U. S. 483.

U. S. v. Cruikshank, 92 U. S. 524.

U. S. v. Simmons, 96 U. S. 360.

None of the indictments in the case at bar comply with this requirement for the reason that any acts charged, are averred in such a vague, incomplete and indefinite manner that convictions or acquittals in the present prosecution would not suffice as a bar to a subsequent prosecution of defendant for the same acts under the same section of the statute, where these acts charged as the fishing for, taking or killing of salmon, in any subsequent prosecution.

This is plainly contrary to the spirit of the criminal jurisprudence of the United States courts, and in the light of the decisions just cited, is sufficient to render these indictments fatally vulnerable to demurrer.

The charge of counsel for the government (page 29, brief of the defendant in error) that counsel for the plaintiff in error have been content with the mere filing of demurrers, in the several cases here consolidated, and have never attempted to

support them by argument except in a very limited and partial manner, is absolutely incorrect.

At the time the various demurrers came on for argument, counsel for the plaintiff in error advanced practically all of the objections to the indictments that were later embodied in the objections made at the beginning of the trial, said objections being shown by the record, page 59, and used almost the identical arguments that are set out in this brief and the brief previously filed. This is subsequently admitted by the district attorney (page 30, brief of defendant in error).

We therefore respectfully submit that the assignment of demurrer, directed to each indictment generally, and to every count therein contained specially, and specifying "That said indictments and counts do not state facts sufficient to constitute a crime against (on the part of) said defendant corporation," sufficiently raise this issue and that the demurrers to the several indictments should have been sustained by the trial court.

Specification of Error No. II, THAT THE TRIAL COURT ERRED IN OVERRULING AND DENYING DEFENDANT'S OBJECTIONS MADE AND FILED AFTER THE EMPANELING OF THE JURY AND WHEN THE FIRST WITNESS FOR THE PLAINTIFF WAS PLACED UPON THE WITNESS STAND AND SWORN TO TESTIFY, raises the same issues as to the sufficiency of

the indictments that are presented by the demurrers.

These objections in fact present the substance of the arguments advanced by the plaintiff in error at the time the demurrers came on for hearing.

In discussing these objections, counsel for the government cites the case of Morris v. U. S. 161 Fed. 672 (incorrectly cited as Miller v. U. S.), (page 31 defendant in error's brief) and contends that the practice of making objections of this kind in criminal cases is not recognized in the United States courts.

The district attorney is in error in this regard. All that was decided in the Morris case was that, as the state courts of Missouri and Kansas did not recognize this practice, the Federal courts in these jurisdictions following the state practice, would also refuse to recognize it. However, this is merely a matter of local practice, and as the territorial courts of Alaska have followed the practice of recognizing objections of this nature, it would seem that the contention of counsel for the government is not well founded.

Counsel for the government has also taken exception (page 31, brief of defendant in error) to the fact that these objections do not seem to have been regularly filed in the cause, as they bear no date or file mark. Counsel for the plaintiff in error do not believe that this exception is well taken

as the record shows plainly (pages 59-60) that these objections were made in open court and duly overruled by the presiding judge. That the clerk neglected to stamp a file mark upon them should be of no concern to the plaintiff in error, as any clerical mistake on the part of the clerk of the court in this respect, cannot be charged to it. The record plainly shows, however, that these objections were not only duly filed in open court, but that they were also orally read into the record by counsel for the plaintiff in error.

Counsel for the government also points out (page 31, brief of the defendant in error) that "these obections are repeated and set out in the transcript a number of times with great prolixity and redundancy for what good purpose it would be difficult to say. Transcript, pages 59-64, 79-90, 100-114, 152-154."

Counsel for the plaintiff in error heartily agrees with the learned district attorney upon this point.

For what purpose, good or otherwise, these objections as well as the other parts of the record, are set up, duplicated and triplicated throughout three hundred and fifty-five printed pages, at enormous expense to the plaintiff in error, when everything necessary could have been included in one-third of this space, is not apparent and therefore must remain a subject of speculation.

The plaintiff in error objected to the consolida-

tion of these cases and moved for separate trials, but this motion was overruled, and the cases consolidated, and tried. An order, based upon a stipulation between counsel, was entered by this honorable court, consolidating these cases for the purpose of this appeal, and as the records of each of these cases are absolutely identical, and as the same questions are involved in each appeal, there is no reason for such duplication of the record.

Besides being very costly to the plaintiff in error the transcript is compiled in such a complicated manner as to seriously embarrass and delay both court and counsel in considering its contents.

ERROR OF THE COURT IN OVERRULING DEFENDANTS MOTION FOR NON-SUIT OR INSTRUCTED VERDICT.

ASSIGNMENT OF ERROR NO. IV.

Assignment of error No. IV is directed against the action of the court in overruling the defendant's motion for non-suit or instructed verdict.

This specification of error not only raises many of the same questions that are raised by the demurrers and objections but also raises a vital question as to whether or not the evidence introduced by the government was sufficient to support the verdicts finding the defendant guilty of the commission of the acts denounced by section 5 of the act of June 26, 1906 (section 263 of the Compiled Laws of Alaska).

In this regard, counsel for plaintiff in error wishes to direct the attention of the court to the summary of the testimony and evidence upon which the verdicts were based, given and offered by the witnesses produced, sworn and examined by the government in the causes at bar, as it appears between pages 32 to 41 inclusive, in the brief of the defendant in error. This summary shows that no witness testified that at the time the

defendant is accused of illegal fishing any one of the traps was in fact fishing. All the testimony is confined to the fact that the traps were not adjusted in the manner recommended by the statute. Not one witness testified to the fact that the traps were fishing upon these occasions and there is not one scintilla of evidence to this effect. As a matter of fact, it would not be possible for the traps to catch a single fish in the condition the government's witnesses claim they were in. In fact, the district attorney states (page 56, brief of defendant in error): "We maintain that it is not necessary to allege that it (referring to the traps) caught a single fish. The law places no such burden upon the government. It plainly commands that the traps during the close season shall be maintained as prescribed under penalty of its violation."

On page 57, he further states: "It is true * * * the learned trial judge held that this proof was unnecessary * * *." We therefore earnestly contend that the court erred in overruling the motion for a non-suit or instructed verdict as there was no evidence introduced by the government tending to show that the defendant either fished for, took or killed any salmon of any species in any manner or by any means, during the weekly close season, in violation of section 5 of the Act of June 26, 1906, upon which the indictments purport to be based.

Counsel for the government has gone into a long and detailed discussion concerning fish traps,

their operation, and as to the manenr in which fish pass through traps of the type used by the defendant. Counsel for plaintiff in error will not, at this time, attempt to answer this, as we do not believe that it has any good foundation in the evidence introduced in the case, or that it can have any higher value than the personal opinion of the district attorney. The whole discussion is infinitely biased, and unfair in every particular, and is not the work of an authority upon the subject of trap fishing.

It is told that Abraham Lincoln, in advising a young criminal lawyer, once said: "If you have a good case, stick to the evidence; if you have a poor case, rap the people's witnesses; if you have no case at all, hammer the district attorney."

This policy, in the inverse, has obviously been the course of the counsel for the government throughout of his brief. He has not stuck to the law to fortify and strengthen his contentions, but has merely contented himself with hammering the plaintiff in error, its witnesses, and counsel, and has made no attempt to justify the government's contentions by any sound judicial precedent.

Assignments of error numbers V, VI, VII, VIII and IX, are directed against the action of the court in REFUSING TO GIVE THE JURY CERTAIN INSTRUCTIONS REQUESTED BY THE DEFENDANT, AND IN GIVING TO THE JURY

CERTAIN OTHER INSTRUCTIONS DULY EXCEPTED TO BY SAID DEFENDANT.

The instructions refused by the court and tendered by the defendant, were a fair and correct statement of the defendant's position in the matter at issue, and of the true meaning of the law as it concerns the closing of traps during the weekly close season. It is the contention of the counsel for the plaintiff in error herein, that the whole purpose of this act as applied to traps, is to give effect to the part of the statute prohibiting the taking and killing of fish during the weekly close season, and that within the intendment of this act, any raising and lowering of the trap sufficient to permit of the free passage of salmon and other fishes and prevent their being caught by the traps, is ample under the law.

The instruction of the court set out under the sixth assignment of error, in which instruction the raising and lowering of the window pane was used as an illustration of the manner in which the law intended the trap should be raised or lowered, is far from being lucid, succint, plain and illuminating, as contended by the district attorney. It is, on the contrary, highly argumentative and unfair in its nature. It assumes as a fact that what is necessary to the free passage of air, is necessary to the free passage of fishes. As a matter of fact, no such elaborate steps are necessary to afford a relatively free passage

for fish, as this instruction would imply. It is not to be assumed for a moment that the learned court would wish to state as a fact that if two or three pieces of string were suspended within the window opening, or if a spider web covered the corner of it, that the volume of air passing through the window would thereby be materially affected or decreased, or that the difference in the volume of air would be noticeable to persons occupying the room, under those conditions.

At the time this exception was taken, counsel for the plaintiff in error was under the impression that exceptions had been entered to the whole of the charge of the court, and to each and every one of his instructions in particular, as being argumentative and unfair to the defendant. However, through some inadvertence on the part of counsel, this instruction seems to be the only one included within the assignments of error. In order to appreciate the objectionable nature of this instruction, it is necessary to take into consideration the court's charge to the jury, as a whole. These instructions, as the subsequent actions of the jury plainly show, not only intimidated the jury but gave it a very wrong impression as to the extent and scope of its province and function in the trial of this case, and led the jury to believe that there was no possible way for them to find a state of facts other than the state of facts inferentially outlined to them in the court's charge.

It is true, as pointed out in the answering brief of the district attorney, pages 66 and 67, that the record does not show that any exception was reserved by the plaintiff in error to the instruction of the court set up as specification of error number X, in plaintiff in error's brief. It was only after this matter was called to the attention of counsel by the district attorney's brief, and a thorough investigation of the record made, that this oversight was discovered, and it was a matter of no small surprise to the counsel for plaintiff in error, as they had believed that their objection to this instruction had been embodied in the assignment of errors as shown by the record.

This instruction was so absolutely erroneous that it, in itself, would have been grounds for reversal of the judgments of the court below.

The counsel for the government, in its answering brief, pages 67 to 70, discusses the question of trap fishing and of the free passage of fishes during the weekly close season, in a very academic manner, and proceeds on the hypothesis that in order to allow the free passage of fishes, the way must be clear from the bottom to the surface of the water. This is fundamentally incorrect, and if true, would render it impossible for any fish to negotiate the necessarily shoal waters through which they must proceed on the way to their spawning grounds, as the bottom in such surroundings is an uneven mass of ledges, pinnacles, and ob-

structions of all sorts, upon which kelp and other sea weed grows in great profusion and presents a highly formidable barrier from the crests of such obstruction to the surface of the water, through which all fish must pass.

Counsel's statement as to the construction put on the act by Dr. E. Lester Jones, Deputy Commissioner of Fisheries for the year 1914, is manifestly unfair, as at the time the traps were being operated in the manner complained of, Dr. Jones had in no way given notice of a modification of the previous policy of the department regarding the closing of traps during the weekly close season.

It is hard to determine the viewpoint of the district attorney in his declaration that all of counsel's citations are based under the head of IF. The humor of the district attorney at this point borders on the sublime; but counsel would like to suggest that if he had spent the time in searching for judicial precedents that he has evidently expended in uncovering this apt quotation from Shakespeare, his brief might be more in keeping with the subject under consideration.

The three following assignments of error, viz: ERROR ON THE PART OF THE COURT, 1st: IN RECEIVING AND FILING OVER THE OBJECTIONS OF THE DEFENDANT THE THREE VERDICTS RETURNED HEREIN, AS VER-

DICTS OF THE JURY (SPECIFICATION OF ERROR NO. XI); 2d: IN OVERRULING DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL (SPECIFICATION OF ERROR XII); 3d: IN OVERRULING THE MOTION FOR A NEW TRIAL (SPECIFICATION OF ERROR XIII); 4th: IN RENDERING JUDGMENT HEREIN AND IMPOSING FINES UPON THE DEFENDANT (SPECIFICATION OF ERROR XIV); are directed against the act of the court in refusing to accept the real verdicts returned by the jury and in directing the jury to return verdicts of guilty against the defendant as shown by the record, pages 327-328, and the uncontroverted affidavits of the jurors incorporated therein.

THE FINDING OF THE JURY THAT THE DEFENDANT WAS NOT GUILTY OF VIOLATING THE SPIRIT OF THE LAW WAS A FINDING INCOMPATIBLE WITH THE GUILT OF THE DEFENDANT AND WAS EQUIVALENT TO AN ACQUITTAL.

Counsel for the government in their brief, pages 75 to 79, have treated the questions raised by these assignments of error, as worthy of but slight consideration. Without citing any law and relying chiefly upon ridicule to support them, they have sought to minimize the importance of the points raised.

The contention advanced by the district attorney that the foreman of the trial jury was attempting to interpret the law in the case, thereby going outside his legitimate province as a juryman, is shown upon the face of the record to be groundless. The same is true of the insinuation that the foreman was alone in his conclusions, and that the rest of the jury were not in sympathy with them.

It is indeed true that the interpretation or construction of the law is outside of the province of the jury, but it is also true that the application of the law as interpreted and construed by the court, to the facts as found by the jury, is clearly within its legitimate province. If this were not true, to use

the classic language of Lord Vaughan in Bushell's case (Vaughan's Reports p. 146) "every one sees that the jury is but a troublesome delay, which were a strong and new found conclusion, after a trial so celebrated for many hundreds of years in this country."

The relative provinces of the court and of the jury are too well marked and defined to be questioned or elaborated upon at this late day. The jury, having power to determine all questions of fact, must, in order to carry out its function of rendering a general verdict, necessarily have the corresponding power of applying the law (as interpreted and construed by the court) to the facts as determined by it. If a jury was without the power of applying the law, acquired from the court, to the facts that it has found, juries could never render general verdicts but must needs resort to the rendition of special verdicts, which would amount merely to the finding of facts. This would result in incomplete verdicts which in each case, in order to be completed, would require a conclusion of law from the court. In any event, in completing a verdict by its conclusion of law, the court would certainly have to apply the law to the facts found in the same manner as a jury in returning a general verdict.

As the determination of the facts upon which the verdict is based is wholly within the province of the

jury, and as a court or no other person outside of the jury can have any knowledge whatever concerning this state of facts or question in any manner their sufficiency, or the process of reasoning employed by the jury in its deductions, it must be conclusively presumed that the jury followed the law as interpreted by the court in reaching its verdict, and that any imperfection or insufficiency in the verdict was due to a failure upon the part of the jury to find some vital element or fact necessary to constitute guilt, and not the result of a wilful attempt upon the part of the jury to interpret the law in a manner contrary to the interpretation of the court in its instructions. Therefore it must be granted that the verdict of the jury finding the defendant "not guilty of a violation of the spirit of the law" was the result of the failure of the jury to find some vital fact necessary to the guilt of the defendant, and not an attempt upon its part to place its own interpretation upon the statute in question, as the law can only arise out of the facts and the court cannot know what the facts are until the jury has returned its verdict.

This finding of the jury, under the rule laid down in Holy Trinity Church vs. U. S. 143 U. S. 459, which has been consistently followed by the courts of the United States since first enunciated by Mr. Justice Brewer, was certainly a finding that the defendant was not guilty of the crimes charged in the indictment, as it absolutely negatived the

presence of an element essential to constitute the defendant guilty of the offense upon which the indictments purport to be based. That the jury actually made this finding and wished to return verdicts which would give it effect, is conclusively shown by the record. The jury had been supplied with only two forms of verdict for each indictment, a set of blank verdicts to be used in case the defendant was found guilty of the offense charged in the various indictments, and a set of blanks to be used in case it was acquitted.

The jury, after retiring to deliberate, by some process of reasoning reached a very significant conclusion and determined upon the rendition of a verdict which should embody this conclusion. The actual determination that the jury reached was that the government had proved the commission of no act upon the part of the defendant, which was denounced by, or came within the statute, upon which the court had instructed them.

Unfortunately, the jury had not been sufficiently instructed as to the true significance of such a finding, or provided with the facilities for returning it in the form of a verdict. They had just listened to a very aggressive and highly argumentative instruction by the court, warning them not to invade his province, or interfere with his prerogatives in any manner. The instruction was embodied in language calculated to impress the jury with the idea that their province was very small and that of

the court very broad, that in fact the scope of their inquiry into the matters at issue, was very limited and circumscribed, and subject at all times to the supervision of the court, and consisted merely of the finding of certain facts connected with the transactions involved.

After listening to such an exhortation, it is not probable that any jury would attempt to arrogate any of the prerogatives of the judge or attempt to "interpret the law" as alleged by the district attorney. The subsequent actions of the jury as shown by the record, absolutely prove that they had no such intention. After reaching a determination, by processes of reasoning which can be known to none but themselves, a determination which they not only had the power but the absolute right to make, the jury found that they had been provided with no suitable form to return their verdict. With the instructions of the court still fresh in their minds and with the evident intention not to interfere with any of the prerogatives of the court, the jury decided to go to the court and inform him orally, and explain and modify the form verdict, which they had a right to do under any circumstances.

Before any verdict had been read, and probably before the court had even seen the verdicts as shown by the record (page 327), the foreman of the jury stated as follows, **"Judge, is there**

any way to modify that?" (at this time no verdict had been entered, accepted or even read.) The judge evidently not apprehending the nature of the request, then asked if it was the desire of the jury to recommend mercy. The foreman answered that it was and then orally delivered the finding of the jury as shown by the record (page 327) in the following language: **"We think that while the defendant has violated the letter of the law it has not violated the spirit of the law."** This was an absolute finding upon the part of the jury, upon a consideration of fact.

It had found no fact to convince it beyond a reasonable doubt that the defendant had committed acts sufficient to bring it within the operation of the statute. It was a finding based entirely upon matters of fact, and not an attempt to place any construction or interpretation upon the statute other than that placed upon it by the court. In fact, it must be presumed conclusively that the jury in their deliberations accepted the meaning placed upon this act by the court, as there is nothing to show that they did otherwise.

A jury, while it has not the **right** to disregard the instructions of the court upon the law, in returning a verdict, has the **power** to do so when the issue is merely whether the defendant is guilty or not guilty of the offense charged, and a verdict so rendered can not be questioned. Sparf v. U. S. 156 U. S. 51 (page 80.)

It is indeed within the power of a jury to return a verdict of "not guilty," upon the general issue, against the instructions of the court, as to the law, if it so desires, and such a verdict could not be questioned, as the fact could never be shown that the jury had not reached its verdict upon a failure to find sufficient facts to justify a conviction. It is also true that the jury may, without fear, openly disregard the instructions of the court in returning its verdict, as this is a power that the jury must have as long as it has the power to return a general verdict.

One of the earliest and most classic judicial expositions of this principle is found in Bushell's case (Vaughan's Report, page 146).

Bushell, one of the jurors on the trial of Penn and Mead, had been committed by the court for finding the defendant not guilty against the direction of the court in a matter of law, and, being brought before the court of Common Pleas by "habeas corpus," this cause of committment appeared upon the face of the return to the writ. It was contended by the counsel against Bushell, upon the authority of the maxim, "Ad quaestionem legis non respondent juratores," that the commitment was legal, since it appeared by the return that Bushell had taken upon him to find the law against the direction of the judge, and had been, therefore, legally imprisoned for contempt. It was

upon that occasion that Chief Justice Vaughan, with the concurrence of the whole court, repeated the maxim, "Ad quaestionem legis non respondent juratores," as cited by the counsel for the crown, but denied the application of it to impose any restraint upon jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the "habeas corpus," viz: "That the jury did acquit against the direction of the court in a matter of law," "These words," said the great lawyer, "taken literally and de plano, are insignificant and unintelligible; for no issue can be joined of a matter of law; no jury can be charged with the trial of a matter of law barely. No evidence ever was or can be given to a jury of what is law or not; nor any oath given to a jury to try matter of law alone; nor can any attaint be for such a false oath. Therefore we must take off this veil and color of words, which make a show of being something, but are in fact nothing; for, if the meaning of these words, 'finding against the direction of the court in matter of law,' be that, if the judge, having heard the evidence given in court (for he knows no other), shall tell the jury, upon this evidence, that the law is for the plaintiff or the defendant, and they, under the pain of a fine and imprisonment, are to find accordingly, every one sees that the jury is but a troublesome delay, great charge, and of no use in

determining right and wrong, which were a strong and new found conclusion, after a trial so celebrated for many hundreds of years in this country."

Blackstone, after commenting in the third volume of his Commentaries, upon the excellence of trial by jury in civil cases, expresses himself thus (Vol. 4, page 349):

"But it holds much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogative of the crown. Without this barrier, justices of oyer and terminer named by the crown might, as in France or in Turkey, imprison, dispatch, or exile any man that was obnoxious to government, by an instant declaration that such was their will and pleasure; so that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations, which may sap and undermine it."

Lord Erskine, in his famous argument before Lord Mansfield in the case of the Dean of St.

Asaph, which has always been regarded as one of the great legal masterpieces, comments upon this point as follows:

"When these things are attentively considered, I might ask those who are still disposed to deny the right of the jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should be conferred (on the jury) at random by the blind forms of the law, where no right was intended to pass with it, and which was upon no occasion and under no circumstances to be exercised; which, though exerted notwithstanding in every age and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on, from century to century, the revered guardian of liberty and of life, arresting the arm of the most headstrong government in the worst of times, without any power in the crown or its judges to touch, without its consent, the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him. That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the legislature, is impossible. Believe me, my lord, no talents can reconcile, no authority can sanction, such

an absurdity. The common sense of the world revolts at it."

If the jury, in the case at bar, had wished to disregard the instructions of the court and place their own interpretation upon the law as contended by the district attorney, there would have been no easier way for them to have done this than to have returned verdicts of "not guilty" upon the general issue. But the jury showed that they had no such wish or intention, as they honestly and in open court, through their foreman, put their finding up to the court for what it was worth. The insinuation of the district attorney that the finding of the jury as stated by their foreman, Mr. Gabbs, was a statement of the individual opinion of Mr. Gabbs only, is shown to be incorrect by the uncontroverted affidavits of five of the other jurors, incorporated in the record on pages 73 to 75 inclusive. It is also untrue that the foreman or any of the other jurors attempted to state what they believed the law to be.

When the jury had returned with the finding **that the defendants had violated the letter of the law and not the spirit of the law,** under the rule laid down in Holy Trinity Church vs. U. S., supra, it became the duty of the judge to do one of three things: 1st, to have the verdict entered in the form in which it was orally delivered by the foreman of the jury; 2d, to have the finding entered as a special verdict to be completed by a conclusion

of law from the court; or 3d, to have instructed the jury that if this were their finding, they should sign and return the verdict of acquittal, as under the law the defendant could not be guilty of the offense denounced by the statute upon such a finding.

The last course would probably have been the best, and the course most usually followed under the circumstances, but any one of these three alternatives would have served to have preserved the defendant's constitutional right of trial by jury, and would have resulted in its vindication.

If the court had followed the first course, the defendant must have stood acquitted, as where a verdict is entered that does not respond to, or negatives the issue on trial, it must be treated as a verdict of not guilty of the offense with which the defendant is charged.

Ex parte Harris, 128 Pac. 156.

Vickers v. U. S., 1 Okla. Cr. 458; 98 Pac. 469.

State v. McBride, 19 Mo. 239.

Little v. Larrabee, 2 Greenl. 38.

People v. Ah Ye, 31 Cal. 452.

In Re McVey, 5 Nebr. 481; 70 N. W. 51.

Territory v. Doe, 1 Ariz. 507; 25 Pac. 472.

If the second course had been followed, it is certain that the court, upon reflection, would have

entered a verdict of "not guilty," as he could not well have done otherwise that enter such a verdict upon so incomplete and negative a finding, especially as an essential element of the offense had been directly negatived by the finding itself.

People v. Wells, 8 Mich. 106.

State v. Morris, 104 N. C. 837.

12 Cyc. 690 and cases under Note 8.

Under the circumstances it was at least the duty of the court to instruct the jury that their finding was incompatible with the guilt of the defendant and that the defendant was, therefore, entitled to a verdict of acquittal.

THE VERDICTS OF "GUILTY" ENTERED AGAINST THE DEFENDANT WERE ENTERED AT THE DIRECTION OF THE COURT AND WERE A DIRECT VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A TRIAL BY A JURY.

The court, instead of following any appropriate course at this stage of the proceedings took the case out of the hands of the jury and directed the foreman to return verdicts of guilty with recommendations addressed to himself for mercy incorporated therein.

Before the verdicts had been accepted, read, or entered of record, and after the foreman had orally delivered the real finding of the jury, the court addressed the jury as follows (Record, page 327): **"Well if you wish, you may insert in your verdict"** (a verdict finding the defendant guilty) **" 'with recomendation to the mercy of the court,' if you have agreed upon that"** (referring, no doubt, to the finding of the jury). The court, upon being informed that they had so agreed, then said (Record, page 327): **"Then you may sit here and insert it right in the verdict"** (i. e., the verdict of guilty). The court then directed that the verdicts of guilty be read by the clerk and after the jury had been polled, counsel for the defendant objected to the receiving and filing of the verdicts as verdicts of the jury

(Record, page 328), which objection was thereupon overruled, and the verdicts received and filed by order of the court.

The defendant by its plea of "not guilty," denied each and every material allegation in the indictment and every essential element of the crime charged, thereby raising the general issue and throwing itself upon the country for deliverance from the crime charged in the indictment by the grand jury. It thereupon became the duty of the trial jury to deliver the defendant from the crime charged unless the government proved to the jury beyond a reasonable doubt that the defendant was guilty of every essential element of the crime charged in the indictment.

The jury by its finding that the defendant had complied with the spirit of the law, and was therefore not guilty of a violation of the spirit of the law, did not find the defendant guilty of one of the most essential elements of the crime charged, and its finding that the spirit of the law had not been violated was essentially a finding of not guilty, as it served absolutely to negative the fact of the existence of this most essential requisite of the offense charged, to-wit: the violation of the "spirit of the law."

When the jury reported this finding in open court, it became the duty of the presiding judge, either upon the motion of counsel or independent

of the motion of counsel, to instruct the jury that if they believed that the defendant had not been guilty of a violation of the spirit of the law, it was their duty to return a verdict of not guilty in each case, or to take other appropriate action.

Unfortunately, either through inadvertence or failure to recognize his duty in the premises, the court told the jury that what they meant was a recommendation for leniency, and if so, to write it into their verdict finding the defendant guilty.

By so doing the judge absolutely stepped into the jury box and arrogating to himself the constitutional power of the jury and setting aside the finding of that body, which was equivalent to an acquittal, directed it to return a verdict of guilty with a recommendation addressed to himself asking that the defendant be shown mercy at his hands.

The law reports do not contain a more striking instance of the violation, by a court, of a defendant's right to a trial by jury, in a criminal case. The action of the court in the case at bar cannot be excused or condoned without jeopardizing the constitutional rights of all persons accused of crime and it cannot be explained or justified upon the plea that the jury was attempting to interpret the law. The verdicts stand impeached upon the face of the record, and to allow them to stand in their present status would be a travesty on justice and

a violation of the defendant's constitutional right of trial by jury.

In the case at bar, the violation of the defendant's right of trial by jury, occurred under circumstances different from those under which this question ordinarily arises, but the United States and Federal Reports present numerous instances where the trial courts have been reversed for directing verdicts of guilty against persons and corporations on trial for offenses against the United States. In most cases, the question has arisen where it was uncertain whether or not certain language used by the court amounted to a direction to the jury to find the defendant guilty, or whether or not a given case was criminal or civil in its nature, but the courts have been unanimous in condenming this practice, as a violation of constitutional rights, whenever it has appeared that instructions by the court in a criminal case have amounted to a direction to the jury to return a verdict of guilty.

In the leading case of U. S. v. Taylor, 11 Fed. 470, McCrary, C. J., says:

> "The single question to be determined is whether, in such a case as this, a court may direct a verdict of guilty. It is insisted on the part of the government that, the facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must de-

termine, and that, therefore, the court may direct a verdict either way, in accordance with its opinion of the law. This is the view which was taken by the court below. * * * I find, however, upon an examination of the subject, that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty.

"The constitution guarantees to every accused person 'the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' Sixth amendment. This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous. (Citing State v. Mann, 27 Conn. 281.)

"It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

"The constitution does not deal with the

form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

"It is doubtless true that, in a certain sense and to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

"It has accordingly long been well settled that, while the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge, been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substan-

tially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court, upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instruction of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court.

"In view of this, courts have usually gone no further than to say to the jury that while they may, by a general verdict, determine both the law and the facts, it is their duty to believe the law as laid down by the court. * * *

"It is now well settled in the federal courts that in civil cases where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; * * * but not so in criminal cases. A verdict of acquittal cannot be set aside, and therefore if the court can direct a verdict of guilty, it can do indi-

rectly that which it has no power to do directly.

"By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. That is so notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution.

"In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to consider whether upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone further than to say, when the case was at all dependent upon oral testimony, that if the jury believed all the testimony they should find for the plaintiff or defendant.

"The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance; for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal

case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice Hunt, for whose judgment I entertain the highest respect, I have considered the case with great care. I have also consulted Mr. Justice Miller, who authorizes me to say that he concurs in the conclusion which I have reached, which is that the district court erred in charging the jury to find the defendant guilty, and in overruling the motion in arrest of judgment.

"The judgment of the district court is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion."

In the case of the Atchison, T. & S, F. Ry. Co. v. U. S., which was an action by the government to collect a penalty from the railroad company, upon a verdict of guilty being found against said company, Grosscup, C. J., said:

"The principal question in this case is, did the circuit court err in giving to the jury the peremptory instruction to find the plaintiff in error guilty? And this question turns chiefly upon this further question, was the prosecution of plaintiff in error by the United States, in the case under review, the prosecution of a criminal offense? For if it be a criminal offense,

> plaintiff in error was entitled to the verdict of the jury respecting its guilt or innocence—not a verdict in form only, but a verdict expressing the real judgment of the jury; for such is the guaranty of the sixth amendment to the constitution of the United States, which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. (Citing U. S. v. Taylor (C. C.), 11 Fed. 470; Starr v. U. S. 153 U. S. 625, 14 Sup. Ct. 919, 38 L. Ed. 841.)"

The learned judge, after first determining that this was a criminal prosecution as distinguished from a civil suit to recover a penalty, set the verdict aside on the ground that the trial court had infringed upon the defendant's constitutional right to a trial by jury.

Atchison T. & S. F. Ry. v. U. S., 172 Fed. 195.

In the leading case of Sparf and Hansen v U. S., 156 U. S. 51, Mr. Justice Harlan in his masterly opinion (page 105), said:

> "We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of

> criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in United States v. Taylor, 3 McCrary, 500, 505; 11 Fed. 470. It was there said: * * *" (He then sets out the language used by the learned court in that case.)

This same rule is laid down by Mr. Justice Gray in his equally brilliant dissenting opinion in this case; discussing this subject, he says (page 174):

> "But a person accused of crime has a two-fold protection in the court and the jury, against being unlawfully convicted. If the evidence appears to the court to be insufficient in law to warrant a conviction, the court may direct an acquittal. (Citing Smith v. United States, 151 U. S. 50.) But the court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers."
>
> Sparf and Hansen v. U. S., 156 U. S. 174.

In the case of Dolan v. U. S., 123 Fed. 52, which came before this court upon a rehearing of an appeal from Alaska, Hawley, J., in discussing the

right of a court to invade the province of the jury by its instructions, says:

> "We are of the opinion that the court invaded the province of the jury in the giving of this instruction in this: that it assumed as an established fact that Misener made the statement testified to by Palmer instead of leaving this question of fact to be decided by the jury, contrary to the well-settled principles of the law, and in direct opposition to the provisions of section 157 of the Penal Code of Alaska (Act March 3d, 1889, tit. 2, c. 15, sect. 157, 30 Stat. 1302, c. 429)."

Citing State v. Hatcher, 29 Ore. 309-320; 44 Pac. 584-587.

In Shick v. U. S., 195 U. S. 65, Mr. Justice Harlan in his dissenting opinion discussing the right of trial by jury, says (page 78):

> "It is suggested that if any conflict exists between the absolute requirement in the original constitution (Art. 3, Sec. 2) that the 'trial of all crimes, except in cases of impeachment, **shall** be by jury,' and the provision in the sixth amendment, that the accused, in every criminal prosecution, 'shall **enjoy the right** to a speedy and public trial, by an impartial jury,' etc., the latter having been last adopted, must control.

But there is no such conflict. Those who opposed the acceptance of the constitution said, among other things, that the words of that instrument, strictly construed (Art. 3, Sec. 2), admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the government, or of one taking place in a state or district other than that in which the crime was committed. The framers of the constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible ground of uneasiness on the subject, the sixth amendment was adopted, in which the essential features of the trial required by section 2 of article 3 are set forth. In other words, the trial required by that section is the trial referred to in the sixth amendment. And the jury referred to in both the original constitution and in the amendments was, the authorities all agree, the historical jury of the common law, consisting of twelve persons, no more and no less, whose unanimous verdict was necessary to conviction." * * *

" 'Except in that class or grade of offenses, called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal **legally constituted for that purpose**, the guarantee of an impartial jury to the accused in a criminal prosecution,

conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void.'" * * *

"But the vital inquiry is, in what way, when the defendant pleads not guilty, are the facts to be ascertained and the plea of not guilty overcome? Under the express words of the constitution the answer must be: by trial before a jury of twelve persons organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial and render a judgment in accordance with the verdict of the jury as to the facts. The court and the jury, not separately but **together,** constitute the appointed tribunal which alone, under the law, can **try** the question of crime, the commission of which by the accused is put in issue with a plea of not guilty.

"There are some things so vital in their character that they may not be legally done or legally omitted in a criminal prosecution, even with the consent of the accused. This is abundantly established by authority. The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and

misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases. Certain it is, that felonies and misdemeanors are equally crimes within the meaning of the constitutional provision that the trial of all crimes shall be by jury, and there is no warrant to construe that provision as if it read, 'the trial of all crimes, except in cases of impeachment **and in misdemeanors,** shall be by jury.'"

In Starr v. U. S. 153 U. S. 614, Chief Justice Fuller, in discussing the respective duties of court and jury, says (page 626):

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. (Citing Hicks v. United States, 150 U. S. 442, 452.) The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises or with the circumspection and caution which should characterize judicial utterances." * * *

> "Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

In the case of Thomas v. The American, etc., Land Co., 47 Fed. 550, Speer, J., says (quoting from Hodges v. Easton, 106 U. S. 408):

> "It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the constitution of the United States. They might have waived that right, but it could not be taken away by the court. * * * The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendant of a verdict by the jury.' "

In the case of Breese v. U. S., 108 Fed. 804, the Circuit Court of Appeals for the Fourth Circuit, in considering this question, said:

> "But, inasmuch as the strong opinion expressed by the judge below in his charge to the

jury, in which he used the words 'that, in his opinion, it was the duty of the jury to convict the defendant,' was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the court, we think that it would be proper to grant a new trial. For these reasons the case is remanded to the court below, with instructions to grant a new trial."

Extract from the charge of Chief Justice Jay, in the case of the State of Georgia v. Brailsford, touching on the relative provinces of the court and of the jury:

"It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court; for, as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still,

both objects are lawfully within your power of decision. * * *

"Go then, gentlemen, from the bar, without any impression of favor or prejudice for the one party or the other; weigh well the merits of the case, and do on this, as you ought to do on every occasion, equal and impartial justice."

Georgia v. Brailsford, 3 U. S. 4.

On this point, see also:

Stettinieus v. U. S., 22 Fed. Cas. Case No. 13387.

U. S. v. Morris, 26 Fed. Cas. Case No. 15815.

U. S. v. Baptiste, 24 Fed. Cas. Case No. 14545.

U. S. v. Greathouse, 26 Fed. Cas. Case No. 15254.

U. S. v. Hodges, 26 Fed. Cas. Case No. 15374.

U. S. v. Wilson, 28 Fed. Cas. Case No. 16730.

Chaffee & Co. v. U. S., 85 U. S. 816.

Thompson v. Utah, 110 U. S. 574-579.

Callan v. Wilson, 127 U. S. 540-557.

State v. Stephanus, 53 Ore. 135.

Comm. v. Anthes, 5 Gray 237.

From the foregoing authorities, it is apparent

that the jury, by finding that the defendant was not guilty of a violation of the spirit of the statute in question, reached a conclusion that was equivalent to an acquittal of the defendant, and which absolutely precluded the court from entering a judgment against the defendant. It is also apparent that the trial judge, by setting aside this finding and by ordering the jury to find the defendant guilty, invaded the province of the jury, and arrogated to himself the constitutional powers and duties of the jury, and thereby impaired the defendant's constitutional rights to a trial by jury.

We therefore respectfully submit that, aside from the fact that the demurrers of the defendant to the indictments herein should have been sustained, and independent of the merits of other assignments of error previously discussed, the trial court erred in RECEIVING AND FILING OVER THE OBJECTION OF THE DEFENDANT THE THREE VERDICTS HEREIN; and also erred in OVERRULING THE DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS RENDERED, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL; and erred further in RENDERING JUDGMENTS UPON SAID VERDICTS AND IMPOSING FINES UPON THE DEFENDANT, and that under the circumstances, this honorable court should direct the court below to enter and treat the verdicts rendered herein as

verdicts of acquittal, or grant to the plaintiff in error herein a new trial.

Respectfully submitted,

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